Dataran Rentas Sdn Bhd v BMC Constructions Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–669 OF 1999
GOPAL SRI RAM, MOHD GHAZALI AND ZULKEFLI JJCA
25 SEPTEMBER 2007

Contract — Building contract — Payment under interim certificates — Whether any right to deduct or set off against sums certified under interim certificates

Contract — Building contract — Set off — Whether any right to deduct or set off against sums certified under interim certificates

Contract — Building contract — Standard terms — Failure to pay under interim certificates — Whether determination of contract under cl 26(1)(a) of PAM Conditions justified — PAM Standard Form Building Contract 1969 Edition (without Quantities)

By a letter of award dated 29 July 1997, the appellant (the respondent in the court below) awarded a building contract to the respondent (the petitioner in the court below). Pursuant to the letter of award, it was agreed that the terms and conditions of contract were as per PAM Standard Form Building Contract 1969 Edition (without Quantities) ('PAM Conditions'). Pursuant to cl 30(1) of the PAM Conditions read together with the appendix, the appellant was contractually obliged to pay the respondent the amount due under interim certificate within 30 days. The appellant had failed to pay the following interim certificates within the stipulated time stated under cl 30(1) of the PAM Conditions. By virtue of the breach of contract on the part of the appellant to honour payment of interim certificates, the respondent had vide their solicitors wrote to the appellant on 11 April 1998 of intention to determine the contract unless payment of sums due under the interim certificates was made. The appellant failed to pay the sums due. The respondent had on 24 April 1998 vide solicitors wrote to the appellant to determine the contract under cl 26(1)(a) of the PAM Conditions. At that material time, the appellant did not challenge the respondent's determination of 24 April 1998 nor took steps to refer the matter for arbitration under cl 34 of the PAM Conditions. Following the determination of the contract, the appellant had through the architect wrote to the respondent on 26 June 1998 and proposed terms of an amicable settlement. However, the parties could

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not agree. On 29 July 1998, the respondent issued a s 218(2)(l) notice under the Companies Act 1965 to the appellant who refused and neglected to pay and pursuant to that the respondent filed a winding up petition pursuant to s 218(1)(e) read with s 218(2)(a) of the Companies Act 1965 to wind up the company on the basis that the company was unable to pay its debt. On 16 September 1998, the winding up petition was presented against the appellant. The appellant company was wound up on 13 July 1999. There was no stay of proceedings. It was only after the presentation of the winding up petition against the appellant that the appellant filed the Civil Suit No 895 in the Penang High Court on 29 October 1998 against the respondent claiming breach of contract. The appellant appealed against the decision of the High Court.

Held, dismissing the appeal with costs:

(1) (per **Zulkefli JCA**) The appellant had no right to deduct or set off against the sums certified under the interim certificates. The respondent was entitled to payment immediately and as such the debt could not be disputed and the appellant had no meritorious defence. The appellant's allegation that the determination of contract by the respondent was wrong and that there were defective works was an afterthought. It was wholly inconsistent with their conduct both before and after the determination of the contract on 24 April 1998. Thus the respondent's contractual determination on 24 April 1998 under cl 26(1)(a) of the PAM Conditions was justified and rightly made. The appellant's allegation that it was a wrongful determination must fail and the appellant was not entitled to any right of set off. The appellant had no bona fide dispute or counterclaim against the respondent (see para 10); *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 followed.

(2) (per **Zulkefli JCA**) If the appellant thought the determination of the contract was wrong, they should have referred the matter for arbitration. There is a provision in cl 34 of the PAM Conditions which states that the disputes between the appellant and the respondent may be referred to arbitration. Instead the appellant had sought to negotiate with the respondent for a reduction of the sums due and resumption of work. Also the appellant did not call upon the insurance guarantee granted by Malaysia British Assurance Bhd dated 23 September 1997 which guaranteed the sum of RM140,000 in favour of the appellant in the event the respondent failed to perform the contract. The guarantee was effective from 2 August 1997 to 6 December 1998. If there was any truth in the appellant's allegation that the respondent was in breach in

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determining the contract on 24 April 1998, one would have expected the appellant to call on the guarantee (see para 11).

(3) (per **Gopal Sri Ram JCA**) On a true construction of cll 26(1)(a) and 30(1) of the contract, the appellant's obligation to make payment on an interim certificate was a fundamental term or a primary obligation. Since the appellant did not fulfil a primary obligation of the building contract, the respondent was entitled to treat the contract as at an end (see para 3).

(4) (per **Gopal Sri Ram JCA**) As a general rule, every contracting party has, in equity, a right to set off any sum — liquidated or unliquidated — that may be due from the other provided it arises out of the same or substantially the same transaction. But, like any other common law or equitable right it is capable of exclusion or modification by contract. And where this has happened, the former ceases to be exercisable. Thus, the question whether a building contract admits a right of set off is one that turns upon the true construction of the particular contract. In this instant, the common law and equitable rights of set off had been modified by the terms of the contract. The contractual conditions precedent to the exercise of the right to a set off were clearly absent here and as such the appellant could not on the facts assert the right (see para 4).

(5) (per **Gopal Sri Ram JCA**) Once the respondent had a debt due to it from the appellant that remained unsatisfied, it was entitled to present a winding up petition. All issues that go to challenge the debt may be dealt with at the hearing of the petition. In the present instance the debt was not bona fide disputed on substantial grounds. As such the High Court was entirely correct in directing that the appellant be wound up (see paras 5–6).

[Bahasa Malaysia summary

Melalui sepucuk surat award bertarikh 29 Julai 1997, perayu (responden di Mahkamah Tinggi) telah mengawardkan satu kontrak pembinaan kepada responden (pempetisyen di Mahkamah Tinggi). Menurut surat award itu, ia telah dipersetujui bahawa terma-terma dan syarat-syarat kontrak sama seperti Kontrak Pembinaan Bentuk Piawai PAM Edisi 1969 (tanpa Kuantiti) ('Syarat PAM'). Menurut kl 30(1) Syarat PAM dibaca bersama dengan apendiks, perayu secara kontraktual wajib membayar responden jumlah yang perlu dibayar di bawah sijil interim dalam tempoh 30 hari. Perayu telah gagal untuk membayar sijil-sijil interim tersebut dalam tempoh yang telah ditetapkan seperti dinyatakan di bawah kl 30(1) Syarat PAM. Berikutan pelanggaran kontrak di pihak perayu untuk mematuhi pembayaran sijil-sijil interim tersebut, responden telah melalui peguam-peguam mereka menulis

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kepada perayu pada 11 April 1998 tentang hasrat untuk menentukan kontrak tersebut kecuali jika bayaran jumlah yang perlu dibayar di bawah sijil-sijil interim itu dibuat. Perayu gagal untuk membayar jumlah yang perlu dibayar tersebut. Responden telah pada 24 April 1998 melalui peguam-peguamnya menulis kepada perayu untuk menentukan kontrak tersebut di bawah kl 26(1)(a) Syarat PAM. Pada masa matan, perayu tidak mencabar penentuan 24 April 1998 responden mahupun mengambil langkah untuk merujuk perkara tersebut kepada timbangtara di bawah kl 34 Syarat PAM. Berikutan penentuan kontrak itu, perayu melalui arkitek telah menulis kepada responden pada 26 Jun 1998 dan mencadangkan terma-terma penyelesaian secara persahabatan. Namun, pihak-pihak tidak bersetuju. Pada 29 Julai 1998, responden telah mengeluarkan notis s 218(2)(l) di bawah Akta Syarikat 1965 kepada perayu yang enggan dan cuai membayar dan menurut seksyen itu responden telah memfailkan satu petisyen penggulungan menurut s 218(1)(e) dibaca bersama s 218(2)(a) Akta Syarikat 1965 untuk menggulung syarikat tersebut atas dasar bahawa syarikat itu tidak mampu membayar hutangnya. Pada 16 September 1998, petisyen penggulungan telah dikemukakan terhadap perayu. Perayu syarikat telah digulung pada 13 Julai 1999. Tiada penggantungan prosiding. Hanya selepas petisyen penggulungan dikemukakan terhadap perayu maka perayu telah memfailkan Guaman Sivil No 895 di Mahkamah Tinggi Pulau Pinang pada 29 Oktober 1998 terhadap responden dengan mendakwa berlaku pelanggaran kontrak. Perayu telah merayu terhadap keputusan Mahkamah Tinggi tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Zulkefli HMR**) Perayu tiada hak untuk memotong atau menolak jumlah-jumlah yang disahkan di bawah sijil-sijil interim tersebut. Responden berhak terhadap bayaran tersebut dengan segera dan oleh itu hutang itu tidak boleh dipertikaikan dan perayu tiada pembelaan bermerit. Dakwaan perayu bahawa penentuan kontrak oleh responden adalah salah dan bahawa terdapat kecacatan kerja-kerja hanya suatu yang telah difikirkan kemudian. Ia tidak konsisten secara keseluruhannya dengan perbuatan mereka sebelum dan selepas penentuan kontrak pada 24 April 1998. Oleh itu penentuan kontraktual responden pada 24 April 1998 di bawah kl 26(1)(a) Syarat PAM adalah berjustifikasi dan dibuat dengan sewajarnya. Dakwaan perayu bahawa ia suatu penentuan yang salah hendaklah gagal dan perayu tidak berhak terhadap apa-apa hak penolakan. Perayu tidak mempunyai pertikaian atau tuntutan balas bona fide terhadap responden (lihat perenggan 10); *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57 diikut.

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(2) (oleh **Zulkefli HMR**) Sekiranya perayu berpendapat bahawa penentuan kontrak itu salah, mereka sepatutnya telah merujuk perkara tersebut kepada timbangtara. Terdapat peruntukan dalam kl 34 Syarat PAM yang menyatakan bahawa pertikaian-pertikaian antara perayu dan responden boleh dirujuk kepada timbangtara. Sebaliknya perayu telah meminta untuk berunding dengan responden tentang pengurangan jumlah yang perlu dibayar dan penyambungan semula kerja. Juga perayu tidak memanggil gerenti insurans yang diberikan oleh Malaysia British Assurance Bhd bertarikh 23 September 1997 yang menjamin sejumlah RM140,000 bagi pihak perayu sekiranya responden gagal untuk melaksanakan kontrak tersebut. Gerenti itu berkuat kuasa dari 2 Ogos 1997 hingga 6 Disember 1998. Jikapun terdapat kebenaran dalam dakwaan perayu bahawa responden telah melakukan pelanggaran dalam penentuan kontrak pada 24 April 1998 itu, adalah dijangkakan yang perayu akan meminta jaminan tersebut (lihat perenggan 11).

(3) (oleh **Gopal Sri Ram HMR**) Berdasarkan tafsiran sebenar kll 26(1)(a) dan 30(1) kontrak, tanggungjawab perayu untuk membuat bayaran untuk sijil interim merupakan terma penting atau satu tanggungjawab utama. Memandangkan perayu tidak memenuhi tanggungjawab utama kontrak pembinaan tersebut, responden berhak menganggap kontrak tersebut tamat (lihat perenggan 3).

(4) (oleh **Gopal Sri Ram HMR**) Sebagai peraturan am, setiap pihak yang mengkontrak mempunyai, dalam ekuiti, hak untuk menolak apa-apa jumlah — yang boleh dikira atau tidak boleh dikira — yang mungkin perlu dibayar daripada yang satu lagi dengan syarat ia timbul daripada transaksi sama atau lebih kurang sama. Namun, seperti *common law* atau hak ekuiti lain ia boleh dikecualikan atau diubahsuai oleh kontrak. Dan jika ini berlaku, yang terdahulu tidak lagi boleh dilaksanakan. Oleh itu, persoalan sama ada suatu kontrak pembinaan menyatakan suatu hak penolakan adalah suatu yang perlu dilihat atas tafsiran sebenar kontrak tertentu itu. Dalam kes ini, *common law* dan hak ekuiti penolakan telah diubahsuai oleh terma-terma kontrak. Prasyarat-prasyarat kontraktual untuk menggunakan hak suatu penolakan jelas tidak wujud di sini dan oleh itu berdasarkan fakta tersebut perayu tidak boleh mendesak untuk hak tersebut (lihat perenggan 4).

(5) (oleh **Gopal Sri Ram HMR**) Apabila responden mempunyai hutang yang perlu dibayar daripada perayu yang masih belum diselesaikan, ia berhak mengemukakan satu petisyen penggulungan. Kesemua isu-isu yang mencabar hutang itu boleh dikendalikan semasa perbicaraan petisyen tersebut. Dalam kes ini hutang itu tidak dipertikaikan secara

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bona fide berdasarkan alasan-alasan kukuh. Oleh itu Mahkamah Tinggi secara keseluruhannya betul dalam mengarahkan agar perayu digulung (lihat perenggan 5–6).]

Notes

For cases on payment under interim certificates, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2879–2881.

For cases on set off, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2900–2905.

For cases on standard terms, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2910–2911.

Cases referred to

Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675 (refd)

Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447 (refd)

Ellis Mechanical Services Ltd v Wates Construction Ltd [1978] 1 Lloyd's Rep 33 (refd)

Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd [1995] 2 MLJ 57 (folld)

Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157 (refd)

Shanghai Hall Ltd v Town House Hotel Ltd [1967] 1 MLJ 223 (refd)

Stonegate Securities Ltd v Gregory [1980] Ch 576 (refd)

Legislation referred to

Companies Act 1965 s 218(1)(e), (2)(a), (l)

Appeal from: Companies Winding Up No 28–87 of 1998 (High Court, Pulau Pinang)

JA Yeoh (Shearn Delamore & Co) for the appellant.
Karin Lim (Lim Leng Han & Co) for the respondent.

Gopal Sri Ram JCA:

[1] I have read the judgment of my learned brother Zulkefli and agree with the views he has expressed. I merely wish to add a few words on three aspects of this case to what my learned brother has already said.

[2] First there is the issue of the sums due from the appellant to the respondent for work done. The importance of an employer to pay sums due

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on an architect's interim certificate has been emphasised on numerous occasions. So, in *Ellis Mechanical Services Ltd v Wates Construction Ltd* [1978] 1 Lloyd's Rep 33, Lawton LJ said:

> If the main contractor can turn round, as the main contractor has done in this case and say, 'Well, I don't accept your account; therefore there is a dispute', that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties. He is deprived of his commercial life-blood. It seems to me that the administration of justice in our courts should do all it can to restore that life-blood as quickly as possible.

[3] In my judgment, on a true construction of cll 26(1)(a) and 30(1) of the contract in the present case, the appellant's obligation to make payment on an interim certificate is a fundamental term or to put it slightly differently, a primary obligation. Since the appellant did not fulfil a primary obligation of the building contract, the respondent was entitled to treat the contract as at an end (see *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675).

[4] The second issue is the appellant's alleged right to a set off. As a general rule, every contracting party has, in equity, a right to set off any sum — liquidated or unliquidated — that may be due from the other provided it arises out of the same or substantially the same transaction (see *Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157; *Shanghai Hall Ltd v Town House Hotel Ltd* [1967] 1 MLJ 223. But, like any other common law or equitable right it is capable of exclusion or modification by contract. And where this has happened, the former ceases to be exercisable (see *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57). Thus, the question whether a building contract admits a right of set off is one that turns upon the true construction of the particular contract. In the present case, as pointed out by my learned brother, the common law and equitable rights of set off have been modified by the terms of the contract. The contractual conditions precedent to the exercise of the right to a set off were clearly absent here and as such the appellant could not on the facts assert the right.

[5] The third point is this. Once the respondent had a debt due to it from the appellant that remained unsatisfied, it was entitled to present a winding up petition. All issues that go to challenge the debt may be dealt with at the hearing of the petition. As Wan Hamzah SCJ said in *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447 (at pp 448–449):

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Even where the whole amount of debt claimed is disputed, the court can allow evidence to be adduced to enable it to consider whether or not there was a bona fide dispute and the court is competent to go into the evidence to consider that question for the purpose ultimately of determining whether it should exercise the discretion: *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197.

[6] In the present instance the debt was not bona fide disputed on substantial grounds (see *Stonegate Securities Ltd v Gregory* [1980] Ch 576). As such the High Court was entirely correct in directing that the appellant be wound up.

Zulkefli JCA:

INTRODUCTION

[7] This is an appeal by the appellant (the respondent in the court below) against the decision of the High Court at Penang wherein on a winding up petition filed by the respondent (the petitioner in the court below) against the appellant the High Court had made the following orders:

(i) that the appellant be wound up pursuant to the provisions of the Companies Act 1965;

(ii) that the official receiver be appointed the provisional liquidator of the appellant; and

(iii) that the costs of the petition be paid out of the assets of the appellant.

BACKGROUND FACTS

[8] The relevant background facts leading to the filing of the winding up petition by the respondent against the appellant are as follows:

(1) The respondent's claim against the appellant is for the sum of RM173,096.18 due and owing by the appellant to the respondent pursuant to four interim certificates issued under a building contract entered into between the two parties.

(2) By a letter of award dated 29 July 1997, the appellant awarded a building contract to the respondent.

(3) Pursuant to the letter of award, it was agreed that the terms and conditions of contract are as per PAM Standard Form Building Contract 1969 Edition (without Quantities) ('PAM conditions').

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(4) Pursuant to cl 30(1) of the PAM Conditions read together with the appendix, the appellant was contractually obliged to pay the respondent the amount due under interim certificate within thirty days.

(5) The appellant has failed to pay the following interim certificates within the stipulated time stated under cl 30(1) of the PAM Conditions.

CERTIFICATE NO	DATES	AMOUNT DUE
5	15 January 1998	RM23,876.74
6	15 February 1998	RM23,986.80
7	16 March 1998	RM68,086.41
8	16 April 1998	RM57,146.23
		RM173,096.18

(6) Certificate No 1 to 4 was partly paid in cash and in kind through contra by way of respondent's purchase of one semi-detached industrial unit in the same project from the appellant as the appellant was short of cash and there was never any dispute as to the certificate.

(7) Clause 26(1)(a) of the PAM Conditions reads:

> Without prejudice to any other rights and remedies which the contract may posses, if: (a) the employer does not pay to the contractor the amount due on any certificate within the period for honouring certificates named in the appendix to these conditions and continues such default for seven days after receipts by registered post... then the contractor may thereupon by notice by registered post or recorded delivery to the employer or architect forthwith determine the employment of the contractor under this contract provided that such notice shall not be given unreasonably or vexatiously.

(8) By virtue of the breach of contract on the part of the appellant to honour payment of interim certificates, the respondent had vide their solicitors wrote to the appellant on 11 April 1998 of intention to determine the contract unless payment of sums due under the interim certificates was made. The appellant failed to pay the said sums due.

(9) The respondent had on 24 April 1998 vide solicitors wrote to the appellant to determine the contract under cl 26(1)(a) of the PAM Conditions.

(10) At that material time, the appellant did not challenge the respondent's determination of 24 April 1998 nor took steps to refer the matter for arbitration under cl 34 of the PAM Conditions.

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(11) Following the determination of the contract, the appellant had through the architect wrote to the respondent on 26 June 1998 and proposed terms of an amicable settlement. However, parties could not agree.

(12) On 29 July 1998, the respondent issued a s 218(2)(l) notice under the Companies Act 1965 to the appellant who refused and neglected to pay and pursuant to that the respondent filed a winding up petition pursuant to s 218(1)(e) read with s 218(2)(a) of the Companies Act 1965 to wind up the company on the basis that the company is unable to pay its debt.

(13) On 16 September 1998, the winding up petition was presented against the appellant. The appellant company was wound up on 13 July 1999. There is no stay of proceedings.

(14) It was only after the presentation of the winding up petition against the appellant that the appellant filed the Civil Suit No 895 in the Penang High Court on 29 October 1998 against the respondent claiming breach of contract.

DECISION OF THE COURT ON APPEAL

[9] We are of the view based on cl 26(1)(a) of the PAM Conditions, it gives the respondent the contractual right to determine the respondent's employment under the contract in the event of the failure of the appellant to pay within the time stipulated under cl 30(1). On this point it is to be noted that in the case of *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v Dr Leela's Medical Centre Sdn Bhd* [1995] 2 MLJ 57, the Federal Court held, inter alia, that by virtue of the express provisions of the contract allowing contractual right of set off, it was construed that the contract excludes the operation of common law rights of set off. As such, the employer's right of set off against the sum due under the contract is restricted to those expressly allowed under the contract. In the present case the appellant have no permissible set off under the PAM contract against the certified sum. There was no architect's instruction given under cl 2(1) that the works carried out by the respondent was defective. Neither was there any instruction of the architect given under cl 6(4) for the removal from site of any work, materials or goods which are not in accordance with the contract at all material time prior to the determination of the contract on 24 April 1998.

[10] Applying the legal principles laid down by the Federal Court in *Pembenaan Leow Tuck Chui*'s case, it is our judgment that the appellant have no right to deduct or set off against the sums certified under the interim certificates. The respondent is entitled to payment immediately and as such the debt cannot be disputed and the appellant has no meritorious defence.

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The appellant's allegation that the determination of contract by the respondent was wrong and that there were defective works is an afterthought. It is wholly inconsistent with their conduct both before and after the determination of the contract on 24 April 1998. Prior to the determination of the contract there was never any complaint from the architect in the form of architect's instructions of any failure or breach of contract on the part of the respondent. A reference to the Architect's Interim Certificates No 5, 6, 7 and 8 would show the architect had stated in all these certificates a statement which reads '*Addition/Deduction for works not in accordance with the contract*' as being 'RM nil'. This fact clearly shows there was no breach by the respondent. There was also no cross-claim which has been certified by the architect which entitles the appellant to set off such cross-claim against the certificates issued in favour of the respondent. It therefore follows that the respondent's contractual determination on 24 April 1998 under cl 26(1)(a) of the PAM Conditions was justified and rightly made. The appellant's allegation that it was a wrongful determination must fail and the appellant is not entitled to any right of set off. The appellant has no bona fide dispute or counterclaim against the respondent.

[11] We are also of the view if the appellant thought the determination of the contract was wrong, they should have referred the matter for arbitration. There is a provision in cl 34 of the PAM Conditions which states that the disputes between the appellant and the respondent may be referred to arbitration. Instead the appellant had sought to negotiate with the respondent for a reduction of the sums due and resumption of work. It is also noted that the appellant did not call upon the insurance guarantee granted by Malaysia British Assurance Bhd dated 23 September 1997 which guaranteed the sum of RM140,000 in favour of the appellant in the event the respondent failed to perform the contract. The guarantee was effective from 2 August 1997 to 6 December 1998. If there is any truth in the appellant's allegation that the respondent was in breach in determining the contract on 24 April 1998, one would have expected the appellant to call on the guarantee.

[12] The appellant only filed the Civil Suit No 895 against the respondent after the winding up petition was filed. This shows that the appellant was not acting bona fide and their allegations were mere afterthought. Furthermore the lack of bona fides in the appellant's purported claim can be seen in the report of Messrs Mokhtar & Associates which was undated and upon which the appellant have sought to rely to support their contention that their claim is more than the amount as claimed by the respondent in the interim certificates. This report was undated and was only introduced by way of the appellant's affidavit dated 19 April 1999. This was about one year after the determination of the contract on 24 April 1998. This report was not sanctioned nor verified by the architect who was the superintendent officer of

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the project concerned. It is indeed strange why the appellant did not engage the architect to prepare a report of his inspection since it was the architect who carried out the joint inspection in 1998 following the determination of the contract.

CONCLUSION

[13] For the reasons already stated we would dismiss the appellant's appeal with costs and make an order that the deposits be paid to the respondent to account of taxed costs.

Appeal dismissed with costs.

Reported by Loo Lai Mee